Hallmor, Inc. *and* Local Lodge 52, District Lodge 83, International Association of Machinists and Aerospace Workers, AFL–CIO. Case 6–CA–28619

December 11, 1998

DECISION AND ORDER DENYING MOTION TO DISMISS

BY MEMBERS LIEBMAN, HURTGEN, AND BRAME

At issue in this case is whether the Regional Director, after initially deferring further proceedings on the instant unfair labor practice charge under *Collyer Insulated Wire*, 192 NLRB 837 (1971), properly revoked his decision to defer and resumed processing of the charge when the Respondent reneged on its commitment not to raise a timeliness defense before the arbitrator.[1] Contrary to our dissenting colleague, we find that the Regional Director's decision to resume processing of the charge was clearly correct under well-established deferral principles.

I. FACTUAL BACKGROUND

The relevant facts can be summarized as follows.

In September 1996, the Respondent laid-off employee Craig Groff. In October 1996, the Union filed a grievance concerning the failure to recall Groff subsequent to his layoff. In November 1996, the Union filed the instant 8(a)(3) unfair labor practice charge concerning Groff's September 1996 layoff. In April 1997, an arbitration hearing was held concerning the October 1996 grievance.

On May 1, 1997, the Regional Director advised the Respondent that he would defer further proceedings on the 8(a)(3) charge in accordance with *Collyer*, supra, if the Respondent agreed to arbitrate the dispute regarding Groff's layoff notwithstanding any contractual time limitations on the filing and processing of the grievance. On May 9, 1997, the Respondent replied that it was willing to arbitrate notwithstanding contractual time limitations. Specifically, the Respondent executed a document referred to by the parties as a "*Collyer* willingness form" in which it "expressly state[d] that it is willing to arbitrate the dispute which is the subject of the [instant case], notwithstanding any contractual time limitations on the filing and processing of the grievance to arbitration."

On May 15, 1997, the Acting Regional Director advised the parties that he was deferring further proceedings on the instant charge, citing, as one of his reasons, the willingness of the Respondent "to arbitrate the dispute . . . notwithstanding any contractual time limitations on the filing and processing of the grievance to arbitration." The Regional Director, however, expressly stated that it was his "intention to revoke [his] decision to defer and to resume processing of the charge in the event" the Respondent engaged in "conduct inconsistent with its expression of willingness to arbitrate."

Notwithstanding its execution of the *Collyer* willingness form, the Respondent argued, inter alia, in its May 30, 1997 posthearing brief to the arbitrator that the grievance should be summarily dismissed as untimely. On June 11, 1997, the arbitrator ruled, inter alia, that the grievance must be denied as untimely.

On September 30, 1997, the Regional Director advised the Respondent of his concern that the Respondent had reneged on its promise not to raise timeliness as an issue in the arbitration proceeding. On October 6, 1997, the Respondent replied that "the submission of the *Collyer* willingness form" was an error on its part and that it actually intended to submit "a letter acknowledging that the Company had submitted to arbitration on the merits, but had already argued and continued to press timeliness and other arbitrability issues during the arbitration process." The Respondent added: "It was not ever our intent to abandon issues bearing on arbitrability."

On December 19, 1997, the Regional Director issued a complaint alleging that Groff was laid off by the Respondent in violation of Section 8(a)(3) and (1) of Act. The Respondent filed an answer, admitting in part and denying in part the allegations of the complaint, and asserting affirmative defenses.[2]

On January 20, 1998, the Respondent filed a motion to dismiss the complaint and a supporting brief, and on January 22, 1998, the General Counsel filed an opposition to the motion.

On January 27, 1998, the Board issued an order transferring proceeding to the Board and Notice to Show Cause why the Respondent's motion should not be granted. On February 17, 1998, the Respondent and the General Counsel filed briefs in response to the Notice to Show Cause.

II. ANALYSIS

In *Collyer Insulated Wire*, supra, the Board enunciated its authority to defer to the arbitration process. The Board pointedly observed that its authority was discretionary. Id. at 840. A key element of the deferral policy is the parties' expressed willingness to waive contractual time limitations in order to ensure that the arbitrator addresses the merits of the dispute. See *Johnson-Bateman Co*., 295 NLRB 180, 181 fn. 6 (1989), and cases cited therein; *Pilot Freight Carriers, Inc*., 224 NLRB 341, 345 (1976). When the Board reaffirmed the *Collyer* doctrine in *United Technologies Corp.*, 268 NLRB 557 (1984), it

[1] The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] The General Counsel denies the Respondent's assertion in its answer that, "at all material times" both "before and after deferral," it advised the Region that it would not retreat from its position that the Groff grievance was untimely, "statements in 'forms' or 'form letters' to the contrary notwithstanding." In light of our denial of the Respondent's motion to dismiss on the ground set forth infra, we find it unnecessary to address this factual disagreement between the Respondent and the General Counsel.

specifically held that the party seeking deferral "must, of course, waive any timeliness provisions of the grievance-arbitration clauses of the collective-bargaining agreement." Id. at 560 fn. 22.

There is no dispute that the Respondent continued to press a timeliness issue before the arbitrator after May 9, 1997, when the Respondent executed a *Collyer* willingness form expressly stating that it was willing to waive any such issues. Indeed, in its October 6, 1997 letter to the Regional Director, the Respondent frankly admitted that it had presented a timeliness issue to the arbitrator and unequivocally stated that, notwithstanding its submission of the *Collyer* willingness form, "it was not ever" its intention to waive a timeliness defense. Yet, it was on the basis of the Respondent's signed statement that it would waive timeliness claims that it obtained the Regional Director's deferral of the case against it, pending arbitration. Now that the arbitration thus obtained has concluded, the Respondent seeks to secure the "fruit" of its incorrect representation by having the Board defer to the arbitrator's award. In our view, where, as here, a party has reneged on its agreement under *Collyer* not to raise a timeliness issue before the arbitrator, such agreement being necessary to secure deferral of the unfair labor practice case to arbitration, the party forfeits any right to obtain the Board's deferral to the resulting arbitration award. Thus, the Regional Director was amply justified under *Collyer* and *United Technologies* in revoking his prior decision to defer and in resuming formal processing of the unfair labor practice case. Accordingly, the Respondent's motion to dismiss the complaint must be denied.

Our application of *Collyer* and *United Technologies* is deliberate, and not, as our dissenting colleague states, a result of confusion. Our dissenting colleague suggests that this "confusion" could have been avoided if the Union had informed the Regional Director that the Respondent continued to press its timeliness argument even after it agreed not to. The Respondent, however, agreed to waive timeliness issues and, in exchange, the Regional Director agreed to defer to the arbitration process. That agreement was between the Respondent and the Regional Director, not the Respondent and the Charging Party. Neither the Regional Director nor the Board has ever suggested that policing an employer's agreement to waive timeliness issues is a union's responsibility. Our dissenting colleague has created such an obligation out of whole cloth.

The Respondent claims in its brief that the Regional Director's concern with its assertion of a timeliness defense is an example of "much ado about nothing," and our dissenting colleague apparently shares this view. We disagree.

As stated in *United Technologies*, the "Board has not deferred cases to arbitration in an indiscriminate manner." 268 NLRB at 560. Rather, the Board has required that certain conditions be satisfied before deferral is appropriate. Id. One critical requirement is that the party seeking deferral agrees to waive any contractual time limitations. Id. The reason for this requirement is to ensure that the arbitration process remains focused on the merits of the dispute and is not distracted by arguments over the timeliness of the grievance under the collective-bargaining agreement.[3] Thus, this requirement promotes the objective of obtaining a fair resolution of the dispute to which the Board can ultimately defer under the standards of *Spielberg Mfg. Co*., 112 NLRB 1080 (1955).

Here, the Respondent plainly breached its agreement not to raise a timeliness defense. Just as a party "is entitled to insist that the Board adhere . . . to provisions of [an] election stipulation that are designed to ensure a fair election," *Frontier Hotel v. NLRB*, 625 F.2d 293, 296 (9th Cir. 1980), so too should the Board be entitled to insist that a party adhere to provisions of a deferral agreement that are designed to ensure a fair adjudication of the dispute.

ORDER

It is ordered that the Respondent's motion to dismiss complaint is denied and the proceeding is remanded to the Regional Director for further appropriate action.

MEMBER HURTGEN, dissenting.

I find, for the reasons set forth below, that it is appropriate to defer to the arbitrator's award in accordance with *Olin Corp.*[1] and *Spielberg Mfg. Co.*[2] Contrary to my colleagues, therefore, I would grant the Respondent's motion for summary judgment and dismiss the complaint.

My colleagues find that deferral is not warranted because the Respondent did not effectively waive arguments concerning the timeliness of the grievance. However, they have confused prearbitral deferral under *Collyer* with postarbitral deferral under *Spielberg* and *Olin*. Under *Collyer,* the Board holds the unfair labor practice charge in abeyance pending the parties' resort to their grievance-arbitration machinery. In order to obtain such deferral, the respondent must agree to waive arguments as to the timeliness of the grievance. By contrast, under *Spielberg* and *Olin*, the arbitration *has been held*, and the issue is simply whether the Board should defer to (i.e., honor) the arbitral result.

In the instant case, the Board's Regional Office concluded that there was a basis for *Collyer* deferral. This was based on an agreement that the Respondent would

[3] In this case, while the arbitrator ultimately did rule on the merits of the grievance, he had already found that the grievance was untimely. Thus, his ruling on the merits was, in fact, only an alternative—and unnecessary—grounds for disposition of the grievance. As such, we can not be totally assured that the arbitrator gave full and fair consideration of the merits. This is precisely what the *Collyer* requirement was intended to avoid.

[1] 268 NLRB 573 (1984).

[2] 112 NLRB 1080 (1955).

waive arguments as to the timeliness of the grievance. Prior to reaching that agreement, the Respondent had already presented its "timeliness" argument to the arbitrator. The Respondent avers that it told the Regional Office that it would not withdraw its "timeliness" contention. My colleagues do not find to the contrary. Further, even assuming that the Respondent did not so inform the Regional Office, and assuming that Respondent agreed to withdraw its "timeliness" contention, that would not require a different result herein. In such circumstances, the Respondent's breach of the agreement could lead to a revocation of the *Collyer* deferral, if the Union had brought that to the attention of the Regional Office. However, the Union did not do so, and the *Collyer* deferral continued.

The arbitrator ultimately ruled that the grievance was untimely. However, and most significantly, the arbitrator went on to assess and decide the merits. He decided in favor of the Employer-Respondent.

As noted above, the issue is whether there should be deferral under *Spielberg* and *Olin*. In my view, the fact that the unfair labor practice case may have been improperly held in abeyance under *Collyer* is not dispositive of the issue of whether the arbitral award should be deferred to under *Olin* and *Spielberg*. That latter issue is to be decided solely under the *Olin* and *Spielberg* standards set forth below.[3]

In *Olin,* the Board set forth the standards under which it would defer to an arbitrator's award consistent with the standards set forth in *Spielberg*. The Board held that it would defer where the proceedings are fair and regular, all parties have agreed to be bound, the decision of the arbitrator is not clearly repugnant to the Act, and the arbitrator has adequately considered the unfair labor practice issue. The Board placed the burden on the party contesting deferral to show that these standards have not been met.

I find that the first deferral criterion is satisfied in this case because the General Counsel has failed to show that the arbitration proceedings were not fair and regular. The General Counsel appears to argue that the arbitral process or award is flawed because the arbitrator found that the grievance was untimely but then proceeded to decide the unfair labor practice issue anyway. I disagree. It is clear from the arbitrator's opinion and award that he considered and addressed all of the issues bearing on the unfair labor practice allegation. The arbitrator simply chose to have two independent grounds for dismissal. It is not improper for an arbitrator, or any other tribunal, to do this. Indeed, it is commonly done. Furthermore, it is clear that the arbitrator's conclusion that Groff was not terminated for union activity would be the same even if he had found the grievance to be timely. Accordingly, I find that the fairness and regularity of the proceedings**,** and the reliability of the arbitrator's findings on the unfair labor practice issue**,** were not affected by the arbitrator's conclusion that the grievance was untimely.

With respect to the second criterion, I find that all parties have agreed to be bound. Indeed, the General Counsel does not argue or show the contrary. Nor is there any indication that the Union has sought to set aside the award on this or any other ground.

I also find that the General Counsel has failed to establish that the award is repugnant to the purposes and policies of the Act. The arbitrator concluded that Groff was not terminated for union activity. This was based on the testimony of Groff's supervisor that Groff inquired about joining the Union after he was told that he was terminated. The arbitrator credited the supervisor's testimony over Groff's testimony that his termination followed his inquiry about union membership. In resolving this conflict in testimony, the arbitrator drew an adverse inference against Groff based on the Union's failure to present the chief steward to corroborate Groff's claim about the timing of his inquiry. The arbitrator's credibility determinations are not inconsistent with those regularly made by administrative law judges and relied on by the Board. Thus, there is no indication that the arbitrator's credibility determinations, or the conclusion he drew therefrom that Groff was not terminated for engaging in protected activity, are clearly wrong or repugnant to the Act.

With regard to the final deferral criterion, the Board stated in *Olin* that it would find that an arbitrator has adequately considered the unfair labor practice issue if the contractual issue is factually parallel to the unfair labor practice issue and the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice issue. The General Counsel has not established that the contractual and unfair labor practice issues are not factually parallel or that the arbitrator was lacking any evidence relevant to the determination of the unfair labor practice issue. The grievance, which framed the issue on which the arbitration was based, alleged that the Company violated the contract by not recalling Groff prior to hiring a new employee. Before the arbitrator, the Union specifically argued that "Mr. Groff was not recalled because he had asked on September 3, 1996 to join the Union through the steward." The Respondent argued, among other things, that its termination and failure to recall Groff was not motivated by his union activities. Moreover, as stated previously, both Groff and his supervisor testified regarding the circumstances and timing of Groff's inquiry about union membership and his termination. Further, the factual summary set forth in the arbitrator's decision demonstrates that the arbitrator was cognizant of the theory of the unfair labor practice allegation that Groff was discharged and not recalled

[3] My colleagues say that a breach of a *Collyer* agreement leads to a forfeiture of the *Olin-Spielberg* right to rely upon the arbitral award, even if the award itself is wholly valid. They cite no case in support of this proposition. In my view, the arbitral award is valid so long as it meets *Olin-Spielberg* standards.

gation that Groff was discharged and not recalled because he inquired about union membership. Finally, the arbitrator determined that Groff was not discharged for inquiring about union membership. Therefore, given the manner in which the issues were presented to and resolved by the arbitrator, it is clear that the contractual and unfair labor practice issues were factually parallel and that the arbitrator was presented generally with the facts relevant to determining whether the Respondent's conduct constituted an unfair labor practice.

My colleagues argue that, because this case was erroneously deferred under *Collyer,* the arbitration award should not be given deference under *Spielberg*. This contention is a nonsequitur. The *Collyer* doctrine operates to hold a charge in abeyance, pending resort to arbitration. The *Spielberg* doctrine operates to accept an arbitral award that has issued. Thus, the mere fact that a charge should not have been held in abeyance under *Collyer* does not compel the conclusion that the arbitral award should be rejected after it issues. If that award meets *Olin-Spielberg* criteria, it should be accepted. Such acceptance is consistent with the hallowed place that arbitration holds in labor-management relations. It is also consistent with a policy of saving scarce public resources where, as here, the parties have successfully resorted to another forum to resolve their dispute.

My colleagues also argue that a breach of a *Collyer* agreement is analogous to the breach of an election agreement. Assuming arguendo a parallel between the two, this would not aid the majority. As discussed supra, the breach of a *Collyer* agreement can lead to the setting aside of the *Collyer* deferral.[4] But, as discussed, it does not mean that the subsequent arbitral award is unworthy of acceptance.

In sum, I find that the arbitrator's award is worthy of deferral under the criteria set forth in *Olin* and *Spielberg* for postarbitral deferral. Contrary to my colleagues, therefore, I would grant the Respondent's Motion for Summary Judgment and dismiss the complaint.

[4] Thus, I do not agree that a breach of a *Collyer* agreement is "much ado about nothing." It can result in the setting aside of the *Collyer* deferral.